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No. 83-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER D. COBURN,
Petitioner,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States District Court
for the District of Columbia

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	FILED
	)	MAY 7, 1982
Defendant.	)	JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

Plaintiff brings this action against Pan American World Airways claiming employment discrimination on the basis of age.[1] On September 11, 1981, this Court issued a Memorandum Opinion which dismissed all of plaintiff's claims of age discrimination except for those under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, premised on acts which occurred after October 30, 1979. The ADEA claim which remains in the case is premised on defendant's termination of plaintiff's employment on August 31, 1980.

A trial by jury on plaintiff's ADEA action began on March 16, 1982. At the close of plaintiff's case, and again at the close of all the evidence, defendant moved for a directed verdict. In both instances, we denied defendant's motion

[1] Plaintiff also claims employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Contemporaneous with this Memorandum Opinion we have issued Findings of Fact and Conclusions of Law in plaintiff's Title VII action. As the events which form the basis of plaintiff's ADEA and Title VII claims are the same, we incorporate those Findings of Fact in this Memorandum Opinion.

without prejudice.[2] On March 19, 1982, the jury returned a verdict in favor of plaintiff, finding that the termination of plaintiff's employment resulted from willful age discrimination by defendant. On April 2, 1982, we entered judgment in accordance with the jury's verdict.

Defendant moves for judgment notwithstanding the verdict, or, in the alternative, for a new trial. For the reasons which follow, we grant defendant's motion for judgment notwithstanding the verdict and deny its alternative motion for a new trial.

DISCUSSION

I. Standard of Review

We are mindful that a trial court must enter judgment contrary to the verdict of a duly constituted jury only when the court concludes that "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Vander Zee* v. *Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978); *Murphy* v. *United States*, 653 F.2d 637, 640 (D.C. Cir. 1981). The evidence and accompanying inferences must be viewed in the light most favorable to the non-moving party, *Mattivi* v. *South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980), and if "fair-minded" jurors in the exercise of "impartial judgment" might disagree on the conclusion to be drawn from that evidence, the court must not grant judgment notwithstanding the verdict. *Boeing Company* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

The jury's verdict, however, must be based on more than mere speculation to withstand a motion for judgment

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[2] While this Court was inclined to grant defendant's motion for a directed verdict, in the interest of judicial efficiency we reserved decision on the motions to allow the case to go to the jury. *Mattivi* v. *South African Marine Corp. "Huguenot"*, 618 F.2d 163, 169 (2d Cir. 1980); *Law* v. *Virginia Stage Lines, Inc.*, 444 F.2d 990, 995 (D.C. Cir. 1971).

notwithstanding the verdict. *Moore* v. *Chesapeake and Ohio Railway Co.*, 340 U.S. 573, 578 (1951). It is vulnerable to such an attack if it "could only have been the result of sheer surmise and conjecture." *Mattivi, supra*, at 168. A mere scintilla of evidence is not enough to support a decision of a jury. *Tackett* v. *Kidder*, 616 F.2d 1050, 1053 (8th Cir. 1980). Instead, "substantial" evidence must underlie the verdict. *Gehrhardt* v. *General Motors Corporation*, 581 F.2d 7, 14 (2d Cir. 1978).

II. Plaintiff's ADEA Claims

Section 623(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), provides

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

An age discrimination claimant must satisfy a two-step process to establish an entitlement to recovery under the ADEA. First, plaintiff must prove all the elements of a prima facie case of discrimination. The burden then shifts to defendant to present some "legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). If defendant does so, the second step which plaintiff must handle is to prove that by a preponderance of the evidence, "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). We conclude that the evidence presented at trial, and all inferences which can be derived therefrom, cannot support a jury verdict that plaintiff has established a prima facie case of discrimination. Further, even assuming that the jury could properly conclude that plaintiff has proved its prima facie case, the evidence is insufficient to support a jury finding that defendant's reasons for terminating plaintiff's employment were but a pretext for discrimination.

A. Prima Facie Case

The Supreme Court has identified the relevant factors which combine to create a prima facie case of discrimination under Title VII. *Texas Department of Community Affairs, supra*, at 253-54; *McDonnell, supra*, at 802. In *McDonnell*, the court concluded that plaintiff had to establish,

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell, supra at 802.

In *McDonnell*, the Court observed that the elements of a prima facie case will vary depending upon the particular circumstances of the Title VII claim. *McDonnell, supra*, at 802 n. 13. However, the basic framework for a prima facie case of discrimination under Title VII applies fully to a claim of age discrimination under the ADEA. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1010 (1st Cir. 1979).

To establish a prima facie case of discrimination resulting from a dismissal pursuant to a reduction-in-force, a claimant must prove by a preponderance of the evidence that (1) he was within a class protected by the ADEA, (2) he performed his job satisfactorily and (3) he was discharged under circumstances which give rise to an inference of unlawful discrimination. *Douglas* v. *Anderson*, 656 F.2d 528, 531 (9th Cir. 1981). Direct evidence of discriminatory motive on the part of defendant is not necessary for a prima facie showing. *Daye* v. *Harris*, 655 F.2d 258, 262 (D.C. Cir. 1981). Yet, plaintiff must present some evidence, be it direct or circumstantial, from which a jury may infer that unlawful discrimination was a likely cause of the dismissal. *Douglas, supra*, at 532.[3] Without doubt,

[3] Plaintiff contends that under *Daye* v. *Harris, supra*, no evidence beyond the membership of plaintiff in the statutorily protected class,

plaintiff established the first two elements of a prima facie case: he comes within the class protected by the ADEA, and during his employment with Pan American he performed satisfactorily. However, the record is utterly devoid of evidence of any type from which a reasonable juror could infer that a likely cause of plaintiff's termination was his age.[4] The evidence demonstrates only that defendant, as a part of a company wide reduction-in-force, conducted a comparative assessment of the four Reservations Supervisors in its Washington, D.C. office. As a result of that "peer group analysis," it concluded that plaintiff was the least competent performer. One of the Reservations Supervisors retained by defendant, Mualla Peck,

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and his performance of satisfactory work, need be shown to infer that discrimination motivated defendant's decision to dismiss plaintiff. *Daye*, however, holds only that direct evidence is not necessary to the establishment of a prima facie case. It does not stand for the proposition that circumstantial evidence is also unnecessary. Under *Texas Department of Community Affairs, supra*, decided by the Supreme Court subsequent to the Court of Appeals decision in *Daye*, plaintiff must show "circumstances which give rise to an inference of unlawful discrimination" to prove his prima facie case. If such an inference is automatic upon the simple showing of membership in a protected class and satisfactory work performance, it would render superfluous the requirement that the circumstances give rise to an inference of discrimination. Clearly, some evidence is necessary upon which to base such an inference beyond a simple showing of the first two elements of the prima facie case.

[4] In denying defendant's motion for summary judgment, we concluded that plaintiff, for purposes of that motion, had made out a prima facie case. At that time, we noted that the applicable test was first an assumption that all of plaintiff's allegations are true, and second, an analysis of whether those presumptively true facts make out a prima facie case of age discrimination. In the present posture of this case we apply a different test: Judgment n.o.v. will be granted only if "the evidence, together with all inferences that can reasonably be drawn therefrom is one-sided that reasonable men could not disagree on the verdict." *Vander Zee, supra*, at 726. We need not accept all of plaintiff's allegations as true, as in the summary judgment context, but we instead examine whether substantial evidence provided at trial, as well as all permissible inferences derived therefrom, supports the verdict of the jury. *Tackett supra*, at 1053. As set forth in more detail above, we conclude that no reasonable jury could find that plaintiff made out a prima facie case of age discrimination.

was substantially older than plaintiff. Moreover, the uncontradicted evidence indicates that plaintiff actually received additional points in the peer group analysis for being over forty years of age. Although several months after plaintiff's discharge the number of Reservations Supervisors was increased, there is no dispute that the increase resulted from the merger of the National Airlines office with that of Pan American.

None of the evidence presented in this case is conducive to the inference that plaintiff was terminated because of his age. For a jury to so infer, it would have to resort to "sheer surmise and conjecture," an insufficient basis to support a verdict. *Mattivi, supra*, at 168.

B. Defendant's Articulated Reason for Terminating Plaintiff's Employment

Even assuming that the evidence was sufficient for the jury to conclude that plaintiff had established a prima facie case of discrimination, we hold that the verdict must be set aside. Defendant articulated a legitimate, nondiscriminatory reason for dismissing plaintiff, and insufficient evidence was presented to demonstrate that defendant's articulated reason was merely a pretext for discrimination. *Texas Department of Community Affairs, supra*, at 254-56.

Defendant contends that plaintiff's employment was terminated only after defendant conducted a peer group analysis pursuant to established Pan American procedures in which plaintiff was compared with other employees in the same area having the same job description and performing essentially the same job functions. Dismissal of admittedly satisfactory employees resulted from a reduction-in-force made necessary by severe financial difficulties which Pan American experienced at that time. Plaintiff attacks various "inaccuracies and inconsistencies" in the analysis but fails to present any evidence from which a juror could conclude or infer that any discriminatory animus underlay the comparative process by which defendant reached its decision.

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination . . . . An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.

Loeb v. *Textron, supra*, at 1012 n. 6.

In other words, as this court has previously observed in the context of a Title VII action, "an employer may make an employment decision for a good reason, a bad reason, or no reason at all," so long as impermissible discriminatory distinctions do not influence that decision. *Winston* v. *Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 473 (D.D.C. 1977).

In the present case, the jury's determination that the process defendant utilized to dismiss plaintiff was a pretext for age discrimination has no evidentiary support and is wholly speculative. No reasonable juror could conclude that plaintiff has proven such an assertion by a preponderance of the evidence.

CONCLUSION

Peter Coburn's story appeals to the sympathy of this Court, as it apparently did to the jury. The record reflects that Mr. Coburn devoted long years of service to Pan American and derived justified pride from that effort. Yet it must not be forgotten that the law under which plaintiff brings suit provides for recovery only in the event that defendant terminated plaintiff's employment because of his age. Neither the Court nor the jury may find for the plaintiff in order to reward past services to defendant or because of some general feeling that plaintiff deserved better from his longstanding employer. "[T]he question for the jury was not whether plaintiff was

treated fairly but whether discrimination occurred." *Sahadi* v. *Reynolds Chemical*, 636 F.2d 1116, 1117 (6th Cir. 1980).

The record simply is devoid of any indication that discriminatory animus on the basis of age played a part in defendant's decision to terminate plaintiff's employment. Reluctantly, we are compelled to grant judgment for defendant notwithstanding the verdict rendered by the jury. We deny defendant's motion in the alternative for a new trial.

An order consistent with the foregoing has been entered this day.

John H. Pratt
United States District Judge

May 7, 1982

United States District Court
for the District of Columbia

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	FILED
	)	MAY 7, 1982
Defendant.	)	JAMES F. DAVEY, Clerk

JUDGMENT

Upon consideration of defendant's motion for judgment notwithstanding the verdict rendered by the jury in the above captioned case on March 19, 1982 and pursuant to which a judgment of this Court was entered on April 2, 1982, or in the alternative for a new trial, the memoranda of points and authorities in support and opposition thereto, and the entire record herein, it is by the Court this 7th day of May, 1982,

ORDERED, ADJUDGED AND DECREED that defendant's motion for judgment notwithstanding the verdict is granted, the judgment of this Court entered on April 2, 1982 is vacated, and judgment is entered in favor of the defendant, and it is

FURTHER ORDERED that defendant's motion in the alternative for a new trial is denied, and it is

FURTHER ORDERED that plaintiff's motions for additional back wages, prejudgment interest, reinstatement, and liquidated damages are denied.

John H. Pratt
United States District Judge